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Sebiro Holdings Sdn Bhd v Bhag Singh & Anor

HIGH COURT (KUCHING) — ORIGINATING SUMMONS NO KCH-24–114/7 OF 2013
RHODZARIAH BUJANG J
26 SEPTEMBER 2013

Arbitration — Arbitrator — Revocation of appointment — Arbitrator appointed by Kuala Lumpur Regional Centre for Arbitration ('KLRCA') not favoured by one party to dispute — Arbitrator proposed by party not agreed to by other party to dispute and hence rejected by KLRCA — Whether application to revoke appointment of arbitrator fatally flawed for failure to follow procedure in s 15(1) of the Arbitration Act 2005 ('AA') — Whether grounds for challenging appointment of arbitrator under s 14(3)(a) and (b) of the AA not fulfilled — Whether venue for arbitration could not be changed as parties had agreed to where it should be held

A contract between the plaintiff and the second defendant provided for disputes between them to be resolved by arbitration. Following the termination of the contract, the plaintiff suggested to the second defendant that it preferred to have the disputes between them arbitrated by Tan Sri Datuk Amar Steve Shim Lip Kiong ('Steve Shim') but the second defendant did not agree to the proposal. The arbitration agreement between the parties provided that if the parties failed to agree on the choice of arbitrator, one shall be appointed by the Director of the Kuala Lumpur Regional Centre for Arbitration ('KLRCA'). In its letter to the KLRCA, the plaintiff again requested for Steve Shim to be appointed as arbitrator. KLRCA informed the plaintiff that in view of the second defendant's objection, it could not accede to the request. The KLRCA appointed the first defendant ('Bhag Singh') as arbitrator. On receiving notice from Bhag Singh's firm that he had been appointed arbitrator, the plaintiff protested against the appointment to KLRCA but was informed by the latter that it was functus officio with regard to the appointment. The plaintiff then filed the instant originating summons ('the OS') to, inter alia, terminate Bhag Singh's appointment and for an order that the seat of arbitration be in Kuching, Sarawak, where the contract was executed, rather than in Kuala Lumpur. The plaintiff's grounds for the application were that Steve Shim, being a Sarawak national, would have knowledge of the place of performance of the contract which Bhag Singh would not have and that since the witnesses were all in Sarawak it would be practical and cost saving for the arbitration proceedings to be held in Kuching. In opposing the OS, the second defendant pointed out that in its letter to the KLRCA requesting for Steve Shim to be appointed as arbitrator, the plaintiff never indicated that the person appointed as arbitrator was required to have special knowledge of Sarawak's geography. The second

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defendant also contended that the challenge against Bhag Singh's appointment was fatally flawed for non-compliance with ss 14 and 15 of the Arbitration Act 2005 ('the AA').

Held, dismissing the OS:

(1) The plaintiff failed to follow the statutory steps laid down in s 15 of the AA, thus creating a serious flaw or defect in their case which warranted its dismissal. Under s 15(1) of the AA, the opposition to the appointment of arbitrator must first be made to the arbitrator concerned and, that too, within 15 days from the time the plaintiff was aware of his appointment by sending him a written statement of the grounds relied on for challenging his appointment. This gave the challenged arbitrator or the other party time to consider whether to concede to the challenge (under sub-s (2)) or to reject it. When there was no such concession and there was rejection of the objection to the appointment, then only, under sub-s (3), could the plaintiff apply to the High Court to make a decision on the challenge. The instant application also could not be made under O 69 of the Rules of Court 2012 because that procedure was only to be used where the challenge was made under s 15(3) of the AA (see paras 7–8).

(2) The letter from KLRCA rejecting the appointment of the plaintiff's proposed arbitrator was not the relevant one for computing the 30 days within which the application to court under s 15(3) of the AA should be filed, because that letter was merely a disagreement to the arbitrator proposed. As at the date of that letter, Bhag Singh had yet to be appointed. The relevant date for consideration was the date of the letter from KLRCA informing the plaintiff that it was functus officio with regard to Bhag Singh's appointment (see paras 6–7).

(3) There was no agreement between the parties on the qualification the arbitrator was to possess. A challenge against the appointment of an arbitrator could only be based upon the grounds specified in s 14(3)(a) and (b) of the AA and neither of those grounds applied in this case (see paras 9–10).

(4) With regard to the plaintiff's argument that the arbitration should take place in Kuching rather than Kuala Lumpur, the inconvenient truth was that the parties had in cl 54(c) of their agreement agreed for the proceedings to be at the KLRCA in Kuala Lumpur. The seat of arbitration could not be changed to suit the convenience of one party and the court had to respect what the parties had intended and agreed to in writing (see para 15).

[Bahasa Malaysia summary

Satu kontrak antara plaintif dan defendan kedua memperuntukkan agar pertikaian-pertikaian antara mereka diselesaikan melalui timbang tara.

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Berikutan penamatan kontrak itu, plaintif mencadangkan kepada defendan kedua yang ia memilih agar pertikaian-pertikaian antara mereka ditimbangtarakan oleh Tan Sri Datuk Amar Steve Shim Lip Kiong ('Steve Shim') tetapi defendan kedua tidak bersetuju dengan cadangan itu. Perjanjian timbang tara antara pihak-pihak memperuntukkan bahawa jika pihak-pihak gagal untuk bersetuju dengan pilihan seorang penimbang tara, seorang akan dilantik oleh Pengarah Pusat Timbang Tara Serantau Kuala Lumpur ('KLRCA)'. Dalam suratnya kepada KLRCA, plaintif sekali lagi meminta agar Steve Shim dilantik sebagai penimbang tara. KLRCA memberitahu plaintif bahawa berdasarkan bantahan defendan kedua, ia tidak boleh bersetuju dengan permintaan tersebut. KLRCA telah melantik defendan pertama ('Bhag Singh') sebagai penimbang tara. Setelah menerima notis daripada firma Bhag Singh bahawa dia telah dilantik sebagai penimbang tara, plaintif membantah terhadap perlantikan itu kepada KLRCA tetapi telah diberi oleh KLRCA bahawa ia adalah functus officio berkaitan perlantikan itu. Plaintif kemudian telah memfailkan saman pemula ini ('SP') untuk, antara lain, menamatkan perlantikan Bhag Singh dan untuk perintah agar timbang tara itu diadakan di Kuching, Sarawak, di mana kontrak itu telah dilaksanakan, dan bukan di Kuala Lumpur. Alasan-alasan plaintif untuk permohonan itu adalah bahawa Steve Shim, yang merupakan rakyat Sarawak, mempunyai pengetahuan tentang tempat pelaksanaan kontrak yang mana Bhag Singh tidak mengetahui dan oleh kerana saksi-saksi kesemuanya di Sarawak adalah lebih praktikal dan jimat untuk prosiding timbang tara diadakan di Kuching. Dalam membantah SP itu, defendan kedua menegaskan bahawa dalam suratnya kepada KLRCA meminta Steve Shim dilantik sebagai penimbang tara, plaintif tidak menyatakan bahawa orang yang dilantik sebagai penimbang tara dikehendaki mempunyai pengetahuan istimewa tentang geografi Sarawak. Defendan kedua juga berhujah bahawa cabaran terhadap perlantikan Bhag Singh adalah cacat kerana ketidakpatuhan ss 14 dan 15 Akta Timbang Tara 2005 ('AT tersebut').

Diputuskan, menolak SP:

(1) Plaintif telah gagal untuk mematuhi langkah-langkah statutori yang ditetapkan di dalam s 15 AT tersebut, dengan itu menjadikan kes mereka silap atau cacat yang mewajarkan pemberhentiannya. Di bawah s 15(1) AT tersebut, pihak pembangkang kepada perlantikan penimbang tara perlu terlebih dahulu dijadikan penimbang tara berkaitan dan, itu juga, dalam temapoh 15 hari dari masa plaintif sedar tentang perlantikannya dengan menghantarnya kenyataan bertulis tentang alasan-alasan yang digunakan untuk mencabar perlantikannya. Ini memberikan penimbang tara yang dicabar atau pihak lain masa untuk mempertimbangkan sama ada untuk bersetuju kepada cabaran itu (di bawah sub-s (2)) atau untuk menolaknya. Apabila tidak terdapat persetujuan dan terdapat penolakan terhadap bantahan kepada perlantikan itu, maka hanya, di bawah sub-s (3), plaintif boleh memohon kepada Mahkamah Tinggi untuk membuat

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keputusan berhubung cabaran itu. Permohonan ini juga tidak boleh dibuat di bawah A 69 Kaedah-Kaedah Mahkamah 2012 kerana prosedur tersebut hanya boleh digunakan di mana cabaran itu dibuat di bawah s 15(3) AT tersebut (lihat perenggan 7–8).

(2) Surat daripada KLRCA yang menolak perlantikan penimbang tara yang dicadangkan oleh plaintif adalah tidak relevan untuk membuat pengiraan 30 hari di mana permohonan ke mahkamah di bawah s 15(3) AT tersebut patut difailkan, kerana surat tersebut hanya tidak bersetuju dengan penimbang tara yang dicadangkan. Sehingga tarikh surat itu, Bhag Singh belum lagi dilantik. Tarikh relevan untuk dipertimbangkan adalah tarikh surat KLRCA yang memberitahu plaintif bahawa ia adalah functus officio berkenaan perlantikan Bhag Singh (lihat perenggan 6–7).

(3) Tiada perjanjian antara pihak-pihak tentang kelayakan yang perlu dimilik oleh penimbang tara. Cabaran terhadap perlantikan penimbang tara hanya boleh berasaskan alasan-alasan yang dinyatakan di dalam s 14(3)(a) dan (b) AT tersebut dan tiada mana-mana daripada alasan tersebut terpakai dalam kes ini (lihat perenggan 9–10).

(4) Berhubung hujah plaintif bahawa timbang tara itu patut diadakan di Kuching dan bukan di Kuala Lumpur, kebenaran yang sukar adalah bahawa pihak-pihak telah bersetuju dalam fasal 54(c) kepada perjanjian mereka agar prosiding itu diadakan di KLRCA di Kuala Lumpur. Perbicaraan timbang tara tidak boleh diubah untuk disesuaikan dengan permintaan satu pihak dan mahkamah hendaklah menghormati apa yang telah diniat dan dipersetujui secara bertulis oleh pihak-pihak (lihat perenggan 15).]

Notes

For cases on revocation of appointment, see 1(1) *Mallal's Digest* (4th Ed, 2014 Reissue) paras 1714–1717.

Cases referred to

Jungheim, Hopkins & Co v Foukelmann [1909] 2 KB 948, KBD (not folld)
Sundra Rajoo v Mohamed Abd Majed & Anor [2011] 6 CLJ 923, HC (refd)

Legislation referred to

Arbitration Act 2005 ss 13(2), (5)(b), (8), 14, 14(3), (3)(a), (b), 15, 15(1), (2), (3), 20
Rules of Court 2012 O 69

Parameswari d/o Shanmugam (Arthur Lee, Lin & Co) for the plaintiff.
Muhammad Firdaus bin Jamaludin (Senior Federal Counsel, Attorney General's Chambers) for the defendants.

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Rhodzariah Bujang J:

RULING

[1] The plaintiff was awarded a contract by the Government of Malaysia, the second defendant in this case, to renovate and upgrade a school in Kapit Sarawak, named SK Nanga Merit and towards that end, a written agreement was executed by the parties on 28 March 2008 but for reasons which do not concern me in writing this judgment, the contract was terminated on 22 February 2013. The written agreement, at cl 54 thereof, provides for arbitration of disputes between the parties. Following the said termination the same was invoked, and Mr Bhag Singh ('the first defendant') was appointed by the Director of Kuala Lumpur Regional Centre for Arbitration ('KLRCA') as the arbitrator. The plaintiff is dissatisfied with the appointment which was against their chosen candidate, Tan Sri Datuk Amar Steve Shim Lip Kiong, whose name they have suggested to the second defendant earlier on by letter dated 17 April 2013 but which was not agreed to by the second defendant. Tan Sri Datuk Amar Steve Shim Lip Kiong was proposed as the arbitrator on the ground that he has the 'knowledge of the locality of the place of performance' of the contract which the plaintiff contended Mr Bhag Singh does not have. They have therefore filed this originating summons to, inter alia, terminate the appointment of Mr Bhag Singh (sued as the first defendant) and for an order that the seat of arbitration to be in Sarawak where the performance of the contract was executed (see prayer (a) and (d) of the originating summons). Only the second defendant has filed an affidavit to oppose this application.

[2] In the said affidavit, the second defendant referred to the plaintiff's letter dated 15 May 2013 to the KLRCA for the appointment of the arbitrator (and the proposal on their choiced arbitrator) and in that letter the plaintiff did not indicate the specific requirement that the arbitrator be one with a special knowledge of the geography of Sarawak. They also contended that the challenge mounted against the appointment of the arbitrator is premature and not in order. The federal counsel appearing at the hearing of the originating summons, Mr Muhammad Firdaus bin Jamaludin who also affirmed the affidavit in opposition explained further why this originating summons is considered premature and not in order. This has to do with the provision of the Arbitration Act 2005 (Revised 2011), ('the Act').

APPOINTMENT OF AN ARBITRATOR

[3] Before going into the statutory provisions, however, I would first refer to the written agreement of the parties dated 28 March 2008 and numbered as KP/BP/PEM/58/2008. What the parties have agreed in cl 59(h) of the agreement on the appointment of the arbitrator is as follows:

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(h) In the event of the death of the arbitrator or *his unwillingness or inability to act*, then the Government and the Contractor upon agreement shall appoint another person to act as the arbitrator, and *in the event the Government and the Contractor failing to agree on the appointment of an arbitrator, an arbitrator shall be appointed by the person named in the Appendix to these conditions*. (Emphasis added.)

[4] In the appendix to the conditions of contract, it has been further agreed that the Director of KLCRA is the person to decide on the appointment in the event of the disagreement between the parties on the choice of arbitrator.

[5] It is also to be noted under s 13(2) of the Act, the parties are free to agree on a *procedure* for appointing the arbitrator or the presiding arbitrator and this consensus is cl 54(h) of the agreement in this case. As in the said cl 54(h), s 13(5)(b) further provides that when the parties fail to agree on an arbitrator, either party may apply to the Director of KLRCA for the appointment of one. This was what the plaintiff did by its letter dated 15 May 2013 (exh CB7 to the affidavit in support of Bullu a/l Magan). The Act, it must be stressed, contains specific provisions on not just the appointment of the arbitrator but the grounds for challenging his appointment (s 14) and the procedure for challenging it (s 15). Both these sections, submitted the learned federal counsel, have been flouted in this case as did the procedure agreed.

THE CHALLENGE PROCEDURE

[6] The learned federal counsel submitted that the application herein should have been filed, under s 15(3) within 30 days from 17 May 2013, the date of the letter by KLCRA informing the plaintiff that they could not accede to their request to appoint Tan Sri Datuk Amar Steve Shim Lip Kiong as the arbitrator because of the objection raised to it by the second defendant. Ms Parameswary d/o Shanmugam, for the plaintiff, submitted that the 30 days should run from 14 June 2013, the date of the letter from KLRCA informing them that they are functus officio as regards the said appointment of Mr Bhag Singh. This letter was sent in reply to the plaintiff's letter dated 11 June 2013 protesting the appointment of Mr Bhag Singh as the arbitrator, which appointment was informed to the plaintiff by letter dated 3 June 2013 from Bhag Sulaiman & Co (see exh CB11, CB10 and CB9, respectively, to the same affidavit in support of Bullu a/l Magan). This originating summons, it is to be noted, was filed on 12 July 2013.

[7] I would agree with her that the relevant date for consideration should be the 14 June 2013 for the reason that the said s 15 talks of a 'challenged arbitrator'. This denotes the fact that an arbitrator must first be appointed before the challenge to his appointment can be mounted. The letter from KLCRA rejecting the appointment of the plaintiff's proposed arbitrator is

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definitely not the relevant one because it was merely a disagreement on the proposed arbitrator and on that date, the first defendant has yet to be appointed. Despite holding this view, however, my opinion is that the application of the plaintiff here is a non-starter because according to s 15(1), the opposition to the appointment must be first made to the arbitrator appointed and that too within 15 days from the time they were aware of his appointment by sending him a written statement on the grounds relied on for challenging his appointment. This gives the challenged arbitrator or the other party time to consider whether to concede to the challenge (under sub-s (2)) or to reject it. When there is no concession and there is rejection of the objection to the appointment, then only under sub-s (3) the plaintiff can apply to the High Court to make a decision on the challenge.

[8] The plaintiff in this case obviously did not follow the statutory steps laid down in s 15, thus creating a serious flaw or defect in their case which warrants its dismissal. I must also add that this application could not be made under O 69 as well because the said procedure is only, in relation to this case, to be used where the challenge is made under s 15(3) of the Act. Nevertheless, for completeness, I will now consider the other issue raised in the application.

GROUNDS FOR CHALLENGE

[9] The learned federal court submitted that under the Act, only two grounds as provided in s 14(3)(a) and (b) could be raised to challenge the appointment of the arbitrator and they are:

(a) there are circumstance which give rise to justifiable doubt as to the arbitrator's impartiality or independence; and

(b) that he did not possess the qualifications agreed to by the parties.

[10] Neither of these two grounds applied in this case, said he. He referred me to the written agreement where no such agreement on the qualification of an arbitrator is provided for and to which I must agree as I would the obvious fact that no circumstances were shown by the plaintiff to question the impartiality or independence of Mr Bhag Singh. The question is, however, whether these are the only two grounds upon which a challenge can be mounted against the appointment of an arbitrator?.

[11] Section 14(3) is not actually couched in mandatory words for it opens as follows:

An arbitrator may be challenged only if —

(a) ...

(b) ...

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[12] Although the word 'shall' was not used by the Legislature but 'may' nonetheless, following that word with the words 'only if' shows the intention of the Legislature that only these two grounds would hold against the appointment of an arbitrator. The wisdom behind the enactment may be that such a challenge on the appointment should not be arbitrarily or frivolously raised. I would venture to say, with an eye to the eventuality of disputes, contracting parties should, in the face of such a legal provision, agree beforehand on the qualification of the arbitrator or even an arbitrator of their choice, if that be possible.

[13] Ms Parameswari d/o Shanmugam have also referred me to s 13(8) of the Act which provides as follows:

> 13(8) In appointing an arbitrator the Director of the Kuala Lumpur Regional Centre for Arbitration or the High Court as the case may be, shall have due regard to —
>
> (a) any qualifications required of the arbitrator *by the agreement of the parties*;
>
> (b) other considerations that are likely to secure the appointment of an independent and impartial arbitrator; and
>
> (c) in the case of an international arbitration, the advisability of appointing an arbitrator of a nationality other than those of the parties. (Emphasis added.)

[14] She submitted that this provision is to ensure that the Director of KLCRA respects the parties' agreement as to the required qualifications of the arbitral tribunal. The key word here is 'agreement' and as I pointed out earlier, there was no such agreement on the qualification of an arbitrator in this case. It of course cannot be denied that Tan Sri Datuk Amar Steve Shim Lip Kiong, being a Sarawakian, is in a better position to appreciate the geography of the project site, particularly its remoteness and accessibility but that is not to say that Mr Bhag Singh could not be forced, by the circumstances of his appointment, to quickly acquire the same knowledge. I am sure if the need arises, evidence could be led to show the geographical impediments which are of concern to the plaintiff and the parties could even suggest to the arbitrator to visit the project site. The knowledge, in other words, is not impossible to acquire and is not such that it is, with respect, dependent on the inherent capability of the plaintiff's arbitrator of choice.

THE SEAT OF ARBITRATION

[15] With regards to the argument of the plaintiff that the arbitration should take place in Kuching rather than Kuala Lumpur, though it is grounded on practicality and also cost saving as the witnesses are from here, the inconvenient truth for the plaintiff is that the parties have agreed in cl 54(c) for it to be at the

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Regional Centre for Arbitration in Kuala Lumpur. So it cannot be simply changed to suit the convenience of one party and on my part, I would have to respect what the parties themselves have intended and agreed in writing.

[16] As a prelude to concluding this judgment, I would now mention s 20 of the Act raised by Ms Parameswari d/o Shanmugam in her submission which she said supports their contention that their client must be given a fair and reasonable opportunity of presenting their case and that should start with the arbitrator of their choice being appointed. Although I fully agree with her that is what s 20 provides ie that the parties be treated with equality and in the manner as stated above but, and on this I agree with the federal counsel, what the law prescribes for above is for the arbitrator to conduct the proceedings before him in the said manner. This conclusion I draw from the fact that this section is the first of the provisions under Chapter 5 of the Act, titled 'Conduct of Arbitral Proceedings'. It is not the provision to rely on to say that their choice of an arbitrator must be acceded to. I must also mention in this prelude that no case authorities are cited in this judgment on the specific sections raised herein because there were none exactly on point although there was a decision, also of the High Court, on s 14, *Sundra Rajoo v Mohamed Abd Majed & Anor* [2011] 6 CLJ 923 but it concerned an application to remove a co-arbitrator. The only one cited by Ms Parameswari d/o Shanmugam in her written submission (the federal counsel had none to cite), an English case of *Jungheim, Hopkins & Co v Foukelmann* [1909] 2 KB 948 is, with respect, not one to rely on. Although it revolves around the qualification of an arbitrator, it is with regards to a specific clause in the contract of the parties on who should be appointed as the three arbitrators provided in the said clause. In the said case, it was subsequently discovered after the three arbitrators had made the award and after an appeal against the award was heard, that two of the arbitrators did not possess the qualifications stated in that specific clause. In an action brought by the plaintiffs to declare the award null and void, it was held that they were not so qualified and thus have no jurisdiction to determine the dispute. It is patently obvious from my earlier narration of the facts of this case before me that there was no such or similar clause on the qualification of the arbitrator in this case and the citation of that English case, with respect to the effort of counsel, was clearly misplaced.

[17] For the above reasons, I dismiss the application with cost of RM5,000 to the second defendant only since only they have come forward to oppose it.

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Originating summons dismissed.

Reported by Ashok Kumar